89-235

No.



IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD G. POLLY - - - - - Petitioner

*versus*

HOWELL CORPORATION AND LAKE COAL CO., INC. - - - - - Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Order entered by United States Court of Appeals for the Sixth Circuit dismissing Petitioner's appeal for lack of appellate jurisdiction is error and in conflict with the applicable decisions of this Court and other Circuit Courts of Appeal, where the Order, from which the appeal was taken, was a final decision, under 28 U.S.C. Sec. 1291, and the order finally decided an important right, collateral to the rights asserted in the litigation, which would be irreparably lost if appellate review had to await final judgment?

## PARTIES TO THE PROCEEDING

| | |
|---|---|
| PETITIONER | Ronald G. Polly |
| RESPONDENT | Howell Corporation and Lake Coal Co., Inc. |

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# SUPREME COURT OF THE UNITED STATES

October Term, 1989

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RONALD G. POLLY - - - - - *Petitioner*

*v.*

HOWELL CORPORATION AND LAKE COAL CO., INC. - - - - *Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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### STATEMENT OF JURISDICTION

On March 22, 1989, the United States Court of Appeals for the Sixth Circuit entered an Order dismissing the appeal from an Order entered by the District Court for the Eastern District of Kentucky which denied the petitioner's motion for protective order against deposition and for sanctions under Rule 11 and Rule 26(g) of the Federal Rules of Civil Procedure. (Appendix p. 1a).

A timely Petition For Rehearing, filed with the appellate court, was denied on April 21, 1989. (Appendix p. 2a).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1)

## STATEMENT OF THE CASE

On March 27, 1987, respondents, Howell Corporation and Lake Coal Co., Inc., (Howell and Lake) filed a complaint in the U.S. District Court, Southern District of Texas, at Houston, in an action styled *Howell Corporation and Like Coal Co., Inc.* v. *John J. Innes,* Civil Action No. H-87-963, alleging violations of 18 U.S.C. Sec. 1961-1968 (1982), Racketeering Influenced and Corrupt Organizations Act, fraud, and civil conspiracy. The complaint was signed by attorney, Eugene B. Wilshire, Jr., of Houston, Texas, for Howell and Lake. Although not made a party thereto, the petitioner, Ronald G. Polly, an attorney of this Court, was wrongfully and improperly charged and accused by Howell, Lake, and their attorney, Wilshire, as a co-conspirator with the defendant, Innes, in operating an enterprise through a pattern of racketeering activity by fraud, kickbacks, bribes, and other alleged criminal activity, all without factual or legal basis or any legitimate purpose. Peculiarly, the contents of this complaint and the wrongful and malicious accusations against Polly by Howell, Lake, and their attorney, Wilshire, filed in Texas, appeared in newspapers throughout Kentucky and other states, including the *Courier Journal* and the *Lexington Herald-Leader,* and coal trade journals.

While the action was pending in Texas on the defendant's Fed. R. Civ. Pro. 12(b)(6) motions to dismiss, a subpoena was issued on June 26, 1987, by the Clerk of the U.S. District Court for the Eastern District of Kentucky at Pikeville, Kentucky, in the present proceeding and served on Polly at Whitesburg, Letcher County, Kentucky, for deposition noticed for July 7, 1987, which would have been the first deposition in the case at that point. Wilshire, attorney for Howell and Lake, obtained the subpoena and signed the notice of oral deposition filed on June 26, 1987, in the district court, and Forrest E. Cook, attorney of Whitesburg, Kentucky, for Howell and Lake, signed the witness fee check therefor. On July 6, 1987, Polly, *pro se* and by counsel, filed verified motions to quash subpoena and fro protective order and memorandum in support thereof setting out a two-fold basis therefor: 1) that the deposition should not proceed prior to the United States District Court's, Southern District of Texas, at Houston, ruling on the defendant's pending motions to dismiss; and, 2) that Howell and Lake sought the deposition of Polly for improper purposes in violation of Rule 26 of the Federal Rules of Civil Procedure and upon violation and in continuing violation of Rule 11 in filing a complaint for improper purpose by the signature of their attorney, Wilshire, containing wrongful and improper accusations against Polly and without resonable factual or legal basis and without, reasonable pre-filing inquiry or investigation therefor by Howell, Lake, or their attorney, Wilshire.

Polly also filed a motion for stay of the deposition pending a hearing on his verified motions.

On July 7, 1987, the district court entered an Order sustaining Polly's motion for stay of deposition and scheduled a hearing on his motion to quash subpoena and for protective order for July 7, 1987. At the hearing, Polly presented argument, *pro se*, in support of his verified motions to quash subpoena and for protective order stating that he did not represent Howell Corporation, Lake Coal Co., Inc., John Innes, Jim Hogg, a named co-conspirator in the complaint, nor Bright Coal Company, Inc., or Commerce Coal Company, Inc., the "enterprise" alleged in the complaint, in any discussions, negotiations, relations, contracts, or contacts among or between said persons and/or entities from October 24, 1984, through May 8, 1986, the time complained of in said complaint, all of which was known by Howell, Lake, and their attorneys at the time the complaint was filed since said persons and entities at the times complained of in the complaint were represented in their relations, discussions, and contracts by Forrest E. Cook, an attorney for Howell and Lake, that he had no knowledge about any payments from Commerce Coal Company, Inc., Jim Hogg, or anyone else to John Innes during said time or any other time, until being told by various persons in May, 1986, after Innes had been discharged as president of Lake Coal Co., Inc., and that Polly has no information relating to the accusations and issues in said complaint except that he is not involved as wrongfully and im-

properly accused in the complaint. Polly further apprised the court that Howell, Lake, and their principals, Steven K. Howell and Paul Howell, son and father, had undertaken prior improper actions to harass, embarrass, vexate, and harm him by filing a frivolous complaint with Bruce K. Davis, Director of the Kentucky Bar Association in Frankfort, Kentucky, which was dismissed, upon response of Polly, without inquiry. These facts were not controverted by Howell and Lake's attorneys, Eugene Wilshire, Jr., and Stephen E. Embry, Jr., nor did they make any showing indicating that a reasonable pre-filing inquiry had occurred or that the complaint was well grounded in fact and not filed for improper purposes as to Polly. Instead, Wilshire argued that it was "obvious" that Polly had pertinent information since he knew the defendant, Innes, and was a friend and business associate of Jim Hogg. At the hearing on July 7, 1987, Wilshire made statements to the court as follows:

> ". . . Our information at the time was and still is that Mr. Polly was a business associate of Mr. Hogg and was intimately connected with everything that Mr. Hogg had anything to do with. That ssems to be the case.
>
> * * *
>
> . . . but just to give the Court some concept of why we're choosing to take Mr. Polly's deposition at this time early in the case, I would give the Court the benefit of my information. Through the auspices of Mr. Innes in the fall of 1984, my clients purchased coal leases and some equipment, I be-

lieve it was also equipment, from a company by the name of Bright Coal Company. At the time of the negotiations, Bright Coal Company was owned by Mr. Innes, Mr. Polly and Mr. Polly's brother and it was in severe financial difficulty.[1] One of them, the things that we suddenly—that we subsequently learned was that we feel that Mr. Innes misrepresented the terms of that purchase to us. In connection with that purchase, Mr. Polly was relieved of an obligation, a personal obligation of in excess of—I understand from looking at documents yesterday of approximately $750,000 that resulted when that purchase was closed. Now, the importance of that, Your Honor, is the timing. That purchase closed on 10/26/1984, October the 26th, 1984. The first check paid to Mr. Innes by Mr. Hogg occurred on October the 29th of 1984 and was, I assume, a part of the proceeds of the very monies that we funded."

(Wilshire, at TR 4-6.)

There is no evidence recited in such alleged information, even if true, that would in any way implicate Polly in any RICO violations, fraud, or civil conspiracy or that he participated in or even knew about the checks sued on in the Texas complaint on which false allegations against him the deposition was sought.

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[1]Wilshire's statement to the district court that the alleged enterprise, Bright Coal Company, Inc., was owned by Innes, Polly, and Polly's brother at one time, was a falsehood of fact as to Innes having any such ownership, and was also known to be false by Howell, Lake, and Wilshire at the time the complaint was filed and the statement made.

On July 8, 1987, the court entered an Order staying discovery pending a decision on the 12(b)(6) motions in Civil Docket No. H-87-963, *Howell Corporation and Lake Coal Co., Inc.* v. *John J. Innes*, then pending in the U.S. District Court for the Southern District of Texas, at Houston, and directing counsel to advise the court as to the status of those pending motions. The court did not address Polly's arguments for sanctions, including a protective order, against respondents and their attorneys' for their violations of Rules 26 and 11 of the Federal Rules of Civil Procedure.

On July 15, 1987, the court consolidated the within action with Civil Action No. 87-207, initiated by Jim Hogg by the filing of a motion for protective order and for stay of deposition due to poor health, also filed on July 6, 1987.

On August 26, 1987, Howell and Lake filed a status report advising the court that Innes's 12(b)(6) motions had been denied on August 12, 1987, by the U.S. District Court for the Southern District of Texas, at Houston, and requesting the court to lift the stay of discovery entered by its previous Order. A response thereto was filed by Polly on September 10, 1987, requesting that the stay be continued until the United States District Court for the Eastern District of Kentucky had fully ruled on his verified motions for sanctions including a protective order and until a motion for transfer filed in the Texas action had been decided. On October 22, 1987, the court entered an Order con-

tinuing the stay of discovery pending the disposition of the motion to transfer filed in the United States District Court for the Southern District of Texas, at Houston.

On February 15, 1988, Howell and Lake filed a motion to reconsider the Order of October 22, 1987, on the grounds that the defendant in the Texas action had identified Polly as a likely defense witness in an affidavit in support of the defendant's motion to transfer. Howell, Lake, and their attorneys asserted that they were entitled to take the deposition of Polly to develop the cause of action asserted in the complaint. Although Howell, Lake, and their attorneys admitted in their motion that thirteen depositions had been taken, they still did not show any reasonable factual or legal basis for the egregious accusations against Polly in their complaint, and his deposition thereon, and made no showing to deny the verified allegations of improper purposes and violation of Rules 26 and 11 of the Federal Rules of Civil Procedure asserted in Polly's verified motions to quash subpoena and for protective order. Polly filed a response and memorandum on February 22, 1988, again requesting that sanctions, including a protective order, be entered because Howell, Lake, and their attorneys had still made no showing that they had undertaken a pre-filing investigation of the facts and law underlying the wrongful, false, and improper accusations made against Polly in the complaint and pleading thereafter and that the deposition sought was a continuation of these improper purposes,

all in violation of Rules 26 and 11. On March 1, 1988, a Reply was filed herein for Howell and Lake and was signed by attorney Stephen Embry, Jr., of Brown, Todd & Heyburn, of Lexington, Kentucky, and filed therewith the complaint filed in Texas signed by attorney, Wilshire, containing the false accusations against Polly. On March 11, 1988, Polly filed a response and memorandum in reply to the motion to reconsider reciting the specific grounds for the requested sanctions, including protective order.

On July 23, 1988, the court entered an Order and Judgment[2] granting Howell and Lake's motion, lifting the stay of discovery and denying the motion of Polly for protective order and to quash his deposition subpoena. (Appendix p. 3a). In its Memorandum Opinion entered the same day, the court stated that in view of the accusations made by Howell, Lake, and their attorneys against Polly, "it only stands to reason that he [Polly] *may* have information and knowledge relevant to the Texas action." (Appendix p. 5a). Although the court did not specifically address violations of Rules 26 and 11 by Howell, Lake, and their attorneys, Wilshire and Embry, nor Polly's request for sanctions therefor, its Order denied same by effect and implication. The Order recited that it was "FINAL

[2]Not known to Polly and not considered by the district court to Polly's knowledge, the U.S. District Court for the Southern District of Texas at Houston entered on Order on June 29, 1988, transferring the Texas action to the U.S. District Court for the Eastern District of Kentucky at Pikeville, which case is pending as Docket No. 88-255, as has been learned subsequent to the district court's order from which this appeal is taken.

and APPEALABLE" and it did, in fact, end the litigation before the Pikeville District Court completely and finally. Perceiving error in that the court had allowed and endorsed the improper purposes of Howell, Lake, and their attorneys, Wilshire and Embry, in violation of Rules 26 and 11, Polly filed his notice of appeal herein on July 20, 1988.

At the outset of the oral argument on appeal, the Sixth Circuit, *sui sponte,* advised the parties that the Order from which the appeal was taken was not, in its opinion, final. Without argument on the merits, or opportunity for the petitioner to submit memoranda demonstrating the finality of the decision, the Court dismissed from the bench the appeal for lack of appellate jurisdiction. This issue had not been raised theretofore. The Court's Order was entered on March 22, 1988. (Appendix p. 1a). On April 21, 1989, a timely Petition for Reconsideration was denied. (Appendix p. 2a).

## REASONS FOR ALLOWING THE WRIT

**The Order Entered by the United States Court of Appeals for the Sixth Circuit Dismissing Petitioner's Appeal for Lack of Appellate Jurisdiction Is Error and In Conflict with the Applicable Decisions of this Court and Other Circuit Courts of Appeal, Where the Order, From Which the Appeal was Taken, was a Final Decision, under 28 U.S.C. Sec. 1291, and the Order Finally Decided an Important Right, Collateral to the Rights Asserted in the Litigation, Which Would Be Irreparably Lost if Appellate Review had to await Final Judgment.**

28 U.S.C. Sec. 1291 provides:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Federal appellate jurisdiction generally depends on the existence of a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute judgment. *Catlin* v. *United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945). However, Sec. 1291 does not uniformly limit appellate jurisdiction to final judgments which terminate an action. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1225, 93 L. Ed. 1529 (1949). It is a "final decision" which is reviewable. A "final decision" under Sec. 1291 does not necessarily mean the last order to be made in a case. *Gillespie* v. *United States Steel Corporation*, 379 U.S. 150, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964). Although a final judgment is a "final decision", the converse is not always true. *Abney* v. *United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). The courts in applying this statute, have taken a practical rather than technical approach, recognizing that whether a decision is final under Sec. 1291 is so close a question that a decision either way can be supported with equally forceful arguments. See, *Cohen* v. *Beneficial Industrial Loan Corp., supra.* In *Gillespie* v. *United States Steel Corporation, supra,* the Supreme Court stated:

> "It is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality.
>
> * * *

> In deciding the question of finality the most competing considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." at p. 153.

The effect of Sec. 1291 is to disallow an appeal from any decision which is tentative, informal or incomplete. *Cohen* v. *Beneficial Industrial Loan Corp., supra.* In *Gillespie* v. *United States Steel Corporation, supra,* the Supreme Court held that the appellate court had jurisdiction under Sec. 1291 for an immediate appeal from a district court order dismissing certain plaintiffs and counts of a complaint for wrongful death. The Supreme Court stated that the appellate court had properly implemented the same policy Congress sought to promote in 28 U.S.C. 1292(b) by treating this marginal case as final under Sec. 1291.

As in *Gillespie* v. *United States Steel Corporation, supra,* the Supreme Court in *Firestone Tire & Rubber Company* v. *Risjord,* 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981), warned that the finality requirement of Sec. 1291 should not be construed so as to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.

In the present action, the United States Court of Appeals for the Sixth Circuit, in dismissing the appeal for lack of appellate jurisdiction, failed to heed the Supreme Court's warning in *Firestone Tire & Rubber Company* v. *Risjord, supra.* The district court's Order decided the sole issue before the court, there

were no other parties before the court, and this action was completely and finally resolved by the court's Order of June 23, 1988. Moreover, the Order stated that it was "FINAL and APPEALABLE" as there were "no other procedural or substantive issues pending" therein. The petitioner respectfully contends that the Sixth Circuit's contrary ruling from the bench was error.

In *Perlman* v. *United States of America,* 247 U.S. 7, 38 S. Ct. 417, 62 L. Ed. 950 (1918), exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United State attorney, directed to be produced before a grand jury. Perlman, who was a non-party to the patent action, petitioned the district court to prohibit this use invoking a constitutional privilege under the Fourt and Fifth Amendments. Upon denial in the district court,[3] Perlman sought immediate appeal. The United States filed a motion to dismiss the appeal for lack of appellate jurisdiction arguing that the appeal arose from an order which was not final. The Supreme Court, however, rejected the United States' argument stating that to have held otherwise would have rendered Perlman "powerless to avert the mischief of the order." at 274 U.S. 13. The Court held that if the production of exhibits before the grand jury violated Perlman's

[3]It is significant to note that the Supreme Court, after denying the United States' motion to dismiss for lack of appellate jurisdiction, held that Perlman's rights under the Fourth and Fifth Amendments were not violated by granting the United States' attorney access to the impounded exhibits.

rights, then he could protect those rights *only* by a separate proceeding to prohibit the use. To have denied immediate review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman's appellate review of his constitutional claims.

As in *Perlman* v. *United States of America, supra,* Polly's only recourse to protect the right afforded him under Rules 11 and 26(g) protecting him from respondents and their attorneys' misuse of judicial process for improper purposes, was by taking an immediate appeal from the district court's Order of June 23, 1988. If Polly was required to wait until final judgment was entered in the Texas action, now removed to the Eastern District of Kentucky, before filing his appeal, then his rights to be free from respondents and their attorneys' violations of Rule 26(g) prohibiting discovery for improper purposes and Rule 11 prohibiting the signing of pleadings, including complaint, notice of oral deposition and reply, without reasonable prefiling inquiry and reasonable factual and legal basis therefor, and proceeding with improper purpose, are irreparably lost. Polly would have been "powerless to avert the mischief of the order" and would have been subjected to continued abuse of judicial process by appellees and their attorneys in further violation of Rules 11 and 26(g). In any event, since the action in the Eastern District of Kentucky, Civil Action No. 87-207 is a separate action, the district court's order of June 23, 1988, would not be

merged in a final judgment entered in the Texas action, as now removed, and no appeal therefrom would be possible. Therefore, the petitioner respectfully submits that the Sixth Circuit had appellate jurisdiction for the direct appeal from the district court's Order entered June 23, 1988, and that its contrary order of March 22, 1989, was error and certiorari should be granted.

In *United States* v. *Gurney,* 588 F. 2d 1202 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, the Fifth Circuit held that a district court's orders, one written and three oral, denying the press access to various exhibits and transcripts, had sufficient finality to permit appeal under 28 U.S.C. Sec. 1291. Although noting that the three oral rulings may have lacked procedural formality, the Fifth Circuit held that the appeal was justified in light of improbability of further consideration by the district court, the close similarity of the issues disposed of by the written order and oral rulings and the general importance of the rights involved. See also, *Re: Reporters' Committee for Freedom of Press,* 773 F. 2d 1325 (DC 1985); and, *Illinois* v. *Sarbaugh,* 552 F. 2d 768 (7th Cir. 1977). As in *United States* v. *Gurney, supra,* the improbability of further consideration by the district court of Polly's motion, in view of the court's statement that the Order of June 22, 1988, was "FINAL and APPEALABLE", and the general importance of the rights he sought to protect which would be irreparably lost unless an immediate appeal from the Order of June 23, 1988, was taken, demon-

strates that the district court's order herein was final and appealable under Sec. 1291.

Moreover, in *Cohen* v. *Beneficial Industrial Loan Corporation, supra,* the Supreme Court recognized as an "exception" to the "final decision" provision of Section 1291 what has become known as the "Collateral Order Rule". *Cohen, supra,* involved a shareholder derivative civil action in which federal jurisdiction was based on diversity of citizenship. Prior to trial, a question arose over whether a state statute requiring plaintiff's shareholder to post security for the costs of litigation applied in the federal court. Upon denial of its motion to require such security the corporate defendant sought immediate appellate review. The Third Circuit accepted the appeal and reversed and ordered that security be posted. Thereafter, the Supreme Court held that the appellate court had jurisdiction under Sec. 1291 to entertain an appeal from the district court's pretrial order. In arriving at this decision, the Court identified several factors which rendered the district court's order a "final decision" within Sec. 1291. First, the district court's order had fully disposed of the question of the state security statutes' applicability in federal court; in no sense did it 'leave the matter open, unfinished or inconclusive. Second, the decision was not simply a step toward final disposition of the merits of the case which would be merged in final judgment; rather it resolved an issue completely collateral to the cause of action asserted. Finally, the decision had involved an important right

which would be lost probably irreparably if review had to wait final judgment; hence, to be effective, appellate review had to be immediate.

In *Abney* v. *United States, supra,* the Court held that a pretrial order denying defendant's motion to dismiss indictment as a violation of double jeopardy was a "final decision" immediately appealable under Sec. 1291. In *Stack* v. *Boyle,* 341 U.S. 1. 72 S. Ct. 1, 96 L. Ed. 1 (1951), the Court held that pretrial order denying motion for reduced bail was immediately appealable under Sec. 1291. In *Helstoski* v. *Meanor,* 442 U.S. 500, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979), the Court stated that a pretrial order denying defendant's motion to dismiss an indictment as violative of the Speech and Debate Clause of the United States Congress was immediately appealable under such Sec. 1291. And in *Mitchell* v. *Forsyth,* 472 U.S. 516, 105 S. Ct. 1806, 86 L. Ed. 2d 411 (1985), the Court held the district court's order granting plaintiff's motion for summary judgment and denying defendant's claim of qualified immunity was immediately appealable under Sec. 1291.

The factors which persuaded the Supreme Court in these cases to hold that the pretrial order was final and immediately appealable under Sec. 1291 are also present in the facts and circumstances in this case on appeal. First, the district court's order fully disposed of the issue for which the action was filed and left nothing open, unfinished, tentative or inconclusive. The Order stated on its face that no other procedural or substan-

tive issues remained pending. The Order stated that it was "FINAL and APPEALABLE" indicating the improbability of further consideration by the district court of Polly's motion to prevent the continued improper purposes of the respondents' and their attorneys in seeking his deposition in violation of Rule 26(g) on accusations made in a complaint filed in violation of Rule 11. Secondly, the order resolved an issue completely collateral to the cause of action alleged in appellees' complaint filed in the Southern District of Texas, at Houston, Civil Action No. H-87-963, *Howell Corporation and Lake Coal Co., Inc.* v. *John J. Innes.* Finally, the District Court for the Eastern District of Kentucky's order would not be merged in any final judgment entered in the Texas action and did not affect nor would be affected by a trial on the merits in that action. Since Rules 11 and 26(g) are designed to prevent an individual from being injured by an abuse of the court's process, the rights therein afforded to Polly would be irreparably lost should he be required to first be subject to continued abuse of the court's process until final judgment before his appeal would lie. If Polly is to enjoy the full protection granted under Rules 11 and 26(g), to be free from abuse of the judicial process and improper purpose, then his challenge to the court's denial of his motion for sanctions thereunder must be reviewable immediately or the protections are forever lost. The rights therein guaranteed can only be enjoyed if vindicated prior to the taking

of his deposition. See, *Mitchell* v. *Forsyth, supra,* and *Helstoski* v. *Meanor, supra.*

## CONCLUSION

On March 22, 1989, the United States Court of Appeals for the Sixth Circuit dismissed the Petitioner's appeal for lack of appellate jurisdiction. The order, of the United States District Court for the Eastern District of Kentucky, from which the appeal was taken, was a final decision, recited that the order was "FINAL and APPEALABLE", and fully disposed of the issue therein pending which was completely collateral to the cause of action alleged in Respondents' complaint, so that the order would not be merged in any final judgment entered therein. The appellate court's Order denies the Petitioner the full protection granted under Rules 11 and 26(g), to be free from abuse of judicial process and improper purposes, and is inconsistent with the rulings of this Court and other circuit courts of appeal.

Therefore, the Petitioner respectfully requests that his Petition For Writ of Certiorari be granted.

Respectfully submitted,

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*Attorneys for Petitioner*

# APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24

Case No. 88-5801

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

HOWELL CORPORATION; LAKE COAL COMPANY, INC., - - - *Plaintiffs-Appellees,*

*v.*

JOHN J. INNES, - - - - - - - *Defendant,*

RONALD G. POLLY, - - - - *Movant-Appellant.*

**ORDER**—Filed March 22, 1989

BEFORE: MARTIN and MILBURN, Circuit Judges; HACKETT, District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the appeal be dismissed for lack of appellate jurisdiction.

Entered By Order of the Court

(s) Leonard Green
Leonard Green, Clerk

*The Honorable Barbara K. Hackett, United States Judge for the Eastern District of Michigan, sitting by designation.

**No. 88-5801**

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

---

HOWELL CORPORATION; LAKE COAL COMPANY, INC., - - - - *Plaintiffs-Appellees,*

*v.*

JOHN J. INNES, - - - - - - - - *Defendant,*

RONALD G. POLLY, - - - - - *Movant-Appellant.*

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**ORDER**—Filed April 21, 1989

Before: MARTIN and MILBURN, Circuit Judges; and HACKETT,* District Judge.

Upon consideration of the petition for rehearing filed herein by Ronald G. Polly, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

Entered By Order of the Court

(s) Leonard Green
Leonard Green, Clerk

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*The Honorable Barbara K. Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

**Civil Action Nos. 87-206**
**87-207**

---

HOWELL CORPORATION, Et Al., - - - *Plaintiffs,*

*v.*

JOHN J. INNES, - - - - - - *Defendant.*

---

**ORDER AND JUDGMENT**—Filed June 23, 1988

* * * *

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED AND ADJUDGED, as follows:

1. Plaintiffs' motion for the court to reconsider its Order of October 20, 1987, which stayed discovery herein pending a ruling by the Texas court on the motion of John J. Innes to transfer the Texas action to the Eastern District of Kentucky, is GRANTED.

2. Upon reconsideration, discovery in this action is lifted so that plaintiffs can proceed to depose Ronald G. Polly and Jim Hogg, if they so choose, prior to the running of the discovery deadline in the Texas action and/or the Kentucky action.

3. The motion of Ronald G. Polly for a protective order and to quash his deposition subpoena is DENIED.

4. The motion of Jim Hogg to quash service and for a protective order is DENIED.

5. Plaintiffs' motion to consolidate this action (87-206 and 87-207) with 87-284 (the Kentucky action) is PASSED As MOOT.

6. There being no other procedural or substantive issues pending herein, this action is now DISMISSED and STRICKEN from the docket.

7. There being no just reason for delay, this is a FINAL and APPEALABLE Order and Judgment.

This 23rd day of June, 1988.

(s) Scott Reed
Scott Reed, Judge
United States District Court

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

**Civil Action Nos. 87-206**
**87-207**

---

HOWELL CORPORATION, ET AL., - - - *Plaintiffs,*

*v.*

JOHN J. INNES, - - - - - - *Defendant.*

---

**MEMORANDUM OPINION**—Filed June 23, 1988

* * * *

## INTRODUCTION

This matter is before the court on (1) plaintiffs' motion to consolidate this action (87-206 and 87-207) with Pikeville Civil Action No. 87-284, styled *John J. Innes* v. *Howell Corporation, Lake Coal Company, Inc., Paul N. Howell, Stephen K. Howell, Vennis (BRIM) Watts and Forrest Cook* (hereinafter the "Kentucky action"), (2) plaintiffs' motion for the court to reconsider its Order of October 20, 1987, which stayed further discovery in this action (87-206 and 87-207) until the United States District Court for the Southern District of Texas, Houston Division, ruled on the motion of John J. Innes to transfer Houston Civil Action No. H-87-963 (hereinafter the "Texas action") to the Eastern District of Kentucky.

These motions have been fully briefed and are ripe for a decision.

Regardless of the reasons for (1) the dispute among the parties and the non-parties (Ronald G. Polly and Jim

Hogg) involved herein; (2) the dispute among the parties in Civil Action 87-284; and (3) the dispute among the parties in the Texas action, it is clear that these various disputes arise out of circumstances surrounding the principals and attorneys involved in the operations of Howell Corporation and Lake Coal Company, Inc.

Civil Actions 87-206 and 87-207 arose out of the aforementioned Texas action. They concern actions by non-parties to the Texas action to prevent the taking of their depositions; they are strictly procedural, discovery matters.

## HISTORY OF 87-206

Civil Action 87-206 originated with the motion of Ronald G. Polly to stay the taking of his deposition until the Texas District Court ruled on the motion to dismiss the Texas action. Polly also moved the court for a protective order and to quash his deposition subpoena.

On July 8, 1987, the court stayed the taking of his deposition until the Texas Court ruled on the motion to dismiss. On August 12, 1987, United States District Judge David Hittner denied defendant's motion to dismiss the Texas action.

Subsequently, defendant moved the Texas court to transfer the Texas action to the Eastern District of Kentucky. In light of this pending motion, Ronald G. Polly requested the court to continue the stay of discovery until this motion to transfer was decided. On October 20, 1987, this court continued the stay of discovery herein until the motion to transfer was decided by the Texas court.

The parties hereto have advised the court that the Texas court heard the motion to transfer on February 22, 1988; however, as of this writing, it appears that this motion to transfer is still pending.

## HISTORY OF 87-207

This action was initiated by the motions of Jim Hogg, also a non-party to the Texas action, for a protective order to prevent the taking of his deposition on July 8, 1987 by reason of his medical condition (he was recovering from surgery). However, in his memorandum filed in support of his motion for a protective order and his motion to quash the subpoena duces tecum, Mr. Hogg, by counsel, advises the court of the motion to dismiss pending in the Texas action.

In light of Mr. Hogg's alleged medical condition, this court granted a stay of his deposition and directed him to make himself available for his deposition within seven days from the time in which he was able to return to work.

Subsequently, on July 14, 1987, United States District Judge Henry R. Wilhoit, Jr., consolidated 87-206 and 87-207 for all purposes and recused himself from 87-207 so that in the interests of judicial economy, both actions could proceed before the undersigned judge.

Inasmuch as the Order of October 20, 1987 was entered after 87-206 and 87-207 were consolidated, presumably it operates to stay discovery from both Ronald G. Polly and Jim Hogg.

## THE MOTION TO RECONSIDER THE ORDER OF 10-20-87

As grounds for plaintiffs' motion to reconsider the stay of discovery from Ronald G. Polly, they state that because he has been identified as a likely witness for John Innes in the Texas action, they need to depose him before the discovery deadline runs in the Texas action.

Mr. Polly strenuously objects to this motion on the grounds that the taking of his deposition "unreasonably

harasses, annoys, vexes, embarasses and oppresses" him and inhibits him in the practice of law.

The record reflects that at one point prior to the pending litigation, Polly was counsel for Howell Corporation. Further, the affidavit of Charles W. Kenrick states that Polly has been advisory counsel to John Innes. Additionally, there are allegations of record that Howell Corporation may have discharged Polly due to an alleged conflict of interest and a fee dispute.

Furthermore, the Texas action, a civil RICO action, charges that John Innes, as vice-president for Howell Corporation and former manager of its Kentucky coal operations, participated in a scheme of bribery and kick-backs in the operation of Howell's business. This complaint also charges that Polly, John Innes and Jim Hogg acted in concert to operate this enterprise.

In light of this background, the court is of the opinion that Mr. Polly "doth protest too much." Mr. Polly may very well be completely innocent of all charges lodged against him in the Texas action; however, his involvement or lack thereof in relation to this alleged RICO activity is not the point. The point is that since he has apparently been counsel to both Howell Corporation and John J. Innes, it only stands to reason that he may have information and knowledge relevant to the Texas action. Due to his association with these parties, the court is of the opinion that under FRCivP 26, Howell Corporation is entitled to take discovery from Ronald G. Polly, as well as Jim Hogg.

Plaintiff's motion to reconsider the stay of discovery will be granted. Plaintiffs, if they so choose, will be allowed to proveed with the depositions of Ronald G. Polly and Jim Hogg.

## THE MOTION TO CONSOLIDATE

In the interests of judicial economy, plaintiffs moved the court to consolidate this action (87-206 and 87-207) with Pikeville Civil Action No. 87-284, the Kentucky action.

To reiterate, 87-206 and 87-207 pertain strictly to discovery in the Texas action. There is nothing substantive before the court in these two actions. Once the court rules on the motions of Ronald G. Polly and Jim Hogg to quash their deposition subpeonas and for a protective order to prevent their depositions from being taken, there are no substantive matters for this court to consider. The underlying Texas action out of which 87-206 and 87-207 arose is the substantive action that is still pending in Texas.

If there were any substantive issues presented in 87-206 and 87-207, the court could well understand the basis for the plaintiffs' motion to consolidate these actions with 87-284, the Kentucky action. If there were unresolved substantive issues pending herein, it would indeed be most judicially efficient and be in the interests of judicial economy for all three of these actions to be consolidated before the same judge. However, since there are no issues of a substantive nature in 87-206 and 87-207, there is no reason to consolidate them with 87-284.

In light of the court's reconsideration of the stay of discovery, and the court's ruling that the plaintiffs should be allowed to depose Ronald G. Polly and Jim Hogg, this action has effectively been totally resolved and may properly be dismissed. Plaintiffs' motion to consolidate is now moot.

An Order and Judgment in accordance with this Memorandum Opinion will be entered on the same date herewith.

This 23rd day of June, 1988.

(s) Scott Reed
Scott Reed, Judge
United States District Court

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1989**

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No. 89-235

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RONALD G. POLLY,
Petitioner

vs.

HOWELL CORPORATION AND LAKE COAL CO., INC.,
Respondents

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## ABBREVIATIONS

P.A. — Petitioner's Appendix
R.A. — Respondents' Appendix

## TABLE OF AUTHORITIES

## STATUTE INVOLVED IN THE CASE

28 U.S.C. § 1291 (Am. 1982)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The Jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1989**

---

**No. 89-235**

---

RONALD G. POLLY,
Petitioner

vs.

HOWELL CORPORATION AND LAKE COAL CO., INC.,*
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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*This disclosure is made pursuant to Rule 28.1 of the Supreme Court Rules. Respondent Howell Corporation is the parent company of numerous wholly owned subsidiaries of which Lake Coal Co., Inc. was one. The only subsidiary of Howell Corporation which is not wholly owned is an inactive corporation by the name of Howell Microtech, Inc.

## STATMENT OF THE CASE

This appeal arises out of a Kentucky district court order which merely allowed Respondents to take the deposition of a nonparty, Petitioner Ronald Polly, in a civil case originally filed in Houston, Texas. (P.A. 5a - 9a). Respondents are Plaintiffs in the main suit filed against John Innes, a former officer and employee. The main action, filed in Houston in March of 1987, is based upon allegations that Innes accepted bribes and kick-backs during his employment. (P.A. 8a).

On June 30, 1987, Respondents caused a subpoena to be issued by the clerk of the Eastern District of Kentucky to take the deposition of Ronald Polly, a resident of Whitesburg, Kentucky. Innes filed a motion to quash the deposition of Ronald Polly (and others) in the district court in Houston claiming that the deposition notices were premature and harassing because of a pending motion to dismiss. (R.A.3a). The Houston district court denied Innes' motion. (R.A.3a). Mr. Polly then filed a motion for protection in the Eastern District of Kentucky urging similar grounds. The Kentucky district court preliminarily stayed Mr. Polly's deposition awaiting a ruling on a motion to dismiss pending in the Houston district court. After the Houston court denied the motion to dismiss, Polly sought a continued stay of the deposition due to a pending motion to transfer venue. The Kentucky court continued the stay by order dated October 20, 1987. (P.A. 5a - 9a).

In February of 1988, Howell and Lake asked the Kentucky court to reconsider the stay based on several facts. First, the scheduling order of the Houston court required that all discovery be completed prior to June 1, 1988. Second, the necessity to depose Mr. Polly was reiterated. Innes' counsel had disclosed in an affidavit that Mr. Polly was likely to be called as a witness for the defense. The affidavit further revealed that Mr. Polly had acted as advisory counsel to Innes. The record also established that, prior to the litigation, Mr. Polly had served as counsel for Howell and Lake. Finally, the court was advised of the fact that Innes had filed an original action against Howell and Lake in Kentucky as well as a counterclaim in the Houston action. (P.A. 5a - 9a).

In granting the motion to reconsider the Kentucky court stated that, due to Mr. Polly's "association with these parties, the court is of the opinion that under FRCivP 26, Howell Corporation is entitled to take discovery from Ronald Polly . . ." The order of the court was entered on June 24, 1988.

On June 29, 1988, the Houston court, pursuant to motion by John Innes, transferred the main case to the Eastern District of Kentucky. (R.A. 1a). Nevertheless, on July 21, 1988 Mr. Polly filed a notice of appeal of the deposition order of the Kentucky court. On March 22, 1989 the Sixth Circuit dismissed the appeal for lack of appellate jurisdiction. (P.A. 1a). The petition for rehearing was denied by Order dated April 21, 1989. (P.A. 2a). Petitioner claims that the Sixth Circuit erred in dismissing the appeal for lack of jurisdiction.

Meanwhile, Respondents have continued in their efforts to complete discovery in the case now pending in the Eastern District of Kentucky. Mr. Polly was again subpoenaed for deposition and again resisted. Mr. Polly's motion was again denied. The magistrate appointed to resolve pretrial matters issued his opinion dated August 10, 1989 which: (1) denied Mr. Polly's motion to impose sanctions under Rules 11 and 26; (2) denied Mr. Polly's request to quash the deposition subpoena and subpoena *duces tecum;* and (3) denied Mr. Polly's request for a protective order. (R.A.6a). Mr. Polly has filed objections to the magistrate's order.

## SUMMARY OF ARGUMENT

No issues are presented in the Petition which present unique or important questions sufficient to justify this Court expending its time and resources. Petitioner, a material witness, so designated by the Defendant and Counterclaimant in the main case, has simply been ordered to comply with legitimate discovery attempts by Respondents.

The discovery order, which is the subject of this Petition and which the Sixth Circuit ruled was non-appealable and interlocutory, was entered in the Eastern District of Kentucky on June 24, 1988. On June 29, 1988 the main case was transferred from Houston, Texas to the Eastern District of Kentucky. Peti-

tioner's notice of appeal of the discovery order was filed on July 21, 1988. The Sixth Circuit correctly held that, under the facts of this case, the discovery order was a non-appealable interlocutory order because Petitioner has effective review of the order to the Sixth Circuit on appeal of the main case.

## ARGUMENT

No special and important reasons exist for granting this writ of certiorari. Petitioner's efforts to resist discovery have already been granted status and review far beyond any argument of merit. The order of the district court was non-appealable because the main case was pending in the same district at the time the notice of appeal was filed. Petitioner can clearly obtain full and complete review of the discovery order from the Sixth Circuit at the time of appeal of the main case. No justification exists to create an exception to the rule that interlocutory discovery orders are non-appealable.

Petitioner claims that jurisdiction over his appeal to the Sixth Circuit was founded on 28 U.S.C. § 1291. This statute states that the courts of appeals have jurisdiction of appeals from "all final decisions of the district courts . . ." Generally, orders regarding discovery are deemed interlocutory and reviewable only upon appeal from a final judgment. *United States v. Nixon,* 418 U.S. 683, 690-91, 94 S.Ct. 3090, 3098-99, 41 L.Ed. 2d 1039 (1974). The Court recognizes that the finality requirement of 28 U.S.C. § 1291 has embodied within it "a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon,* 418 U.S. at 690, 94 S.Ct. at 3099. This is not to imply, however, that only final judgments may be appealed.

The Court has recognized a small class of decisions which are excepted from the final judgment rule of section 1291. Known as the collateral order doctrine, such an order must meet stringent prerequisites to fall within the exception. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the main action; and (3) be unreviewable on appeal from a final judgment.

*Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed. 2d 351 (1978); *Abney v. United States,* 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed. 2d 651 (1977); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528(1949).

Each of the three requirements must be satisfied to meet the exception. In this case, it is unnecessary to determine whether Petitioner has demonstrated or can demonstrate satisfaction of the first and second requirements, because it is immediately apparent that Petitioner cannot meet the third requirement. The Sixth Circuit correctly dismissed the appeal for lack of appellate jurisdiction because the order complained of by Mr. Polly is clearly reviewable by the Sixth Circuit upon appeal of a final judgment in the main case. The Sixth Circuit will have appellate jurisdiction of the case on the merits which is pending in the United States District Court for Eastern District of Kentucky at Pikeville, the same district that issued the order which Mr. Polly sought to appeal.

Several circuit courts have ruled that even a discovery decision issued by a district court **different** from the court on the merits is a non-appealable interlocutory discovery order. These rulings rest on the fact that the order can be reviewed by the circuit court on the appeal of the merits of the case. In *Barric Group, Inc. v. Mosse,* 849 F.2d 70, 72 (2d Cir. 1988), the court reiterated the general rule that orders denying or compelling discovery are non-appealable because they can be reviewed effectively on appeals from the final judgments. The court held that where the ancillary proceeding and the main proceeding are in different district courts, but in the same circuit, there is no jurisdiction over the appeal of the discovery order. *Barrick Group, Inc.,* 849 F.2d at 73; *See also, In re Subpoena Served on California PUC,* 813 F.2d 1473, 1476-79 (9th Cir. 1987), and *United States v. James T. Barnes and Company,* 758 F.2d 146 (6th Cir. 1985). Application of the general rule to this case can only be more forceful when the main case and the ancillary proceeding are in the same district at the time of filing of the notice of appeal.

The fact that the order transferring the main case to the Eastern District of Kentucky was not before the district court at the time of discovery order is of no consequence. Appellate jurisdiction is initially determined on the date the notice of appeal is filed. *Lamp v. Andrus,* 657 F.2d 1167, 1169 (10th Cir. 1981). The order transferring the main case to the Eastern Distict of Kentucky was entered prior to the filing of Mr. Polly's notice of appeal. The appellate court is required to address a jurisdictional issue anytime such is brought to its attention. Courts must consider all facts and events that are brought to their attention, by whatever manner, even during the appeal, that may affect its jurisdiction. *See, International Union, U.A.W. v. Telex Computer Products, Inc.,* 816 F.2d 519, 521-22 (10th Cir. 1987) and authorities cited therein. Once the Sixth Circuit Court was advised of the transfer of the main case to the Eastern District of Kentucky, it was required to dismiss the appeal for lack of jurisdiction.

There are only two circuit court decisions which even arguably permit an appeal from an ancillary order of a district court that is located in the same circuit that would review the main case on appeal. *See, Heat and Control, Inc. v. Hester Industries, Inc.,* 785 F.2d 1017 (Fed. Cir. 1986) and *Ariel v. Jones,* 693 F.2d 1058 (11th Cir. 1982). Both cases are distinguishable from the instant case. First, the orders were issued out of district courts different than the main case. In the present situation the ancillary order was issued out of the same district that now has the main case. In *Heat and Control, Inc.* the main case was in district court in California and the ancillary order arose out of West Virginia. The main action involved a patent dispute, however, giving the federal circuit court appellate jurisdiction over the final decision of the California district court. 28 U.S.C. § 1295 (1). The case is further distinguished by virtue of the Federal Circuit Court's finding that the main court did not have jurisdiction over the subpoenaed nonparty and, thus, there could be no effective review of the ancillary court's discovery order. *Heat and Control, Inc.* 785 F.2d at 1021. There is no jurisdictional question in this case, and Petitioner has a means for effective review.

Without analysis, the Eleventh Circuit in *Ariel* simply held that the discovery order was appealable. In its opinion, the court

cited four decisions which allegedly supported its conclusion. Each case cited, however, only allowed appeals of ancillary discovery orders issued by district courts sitting in circuits other than the main case district court.[1] These cases correctly recognize that the appellant had no effective review of the ancillary orders, because it could not be reviewed by the circuit court on appeal of the main case. Therefore, the third element of the collateral doctrine was met and the order was appealable.

Such is admittedly not the case in the matter before the Court. The order was issued by the district court, which, at the time Petitioner sought to invoke the jurisdiction of the Sixth Circuit, was the same district where the main action was pending. The Sixth Circuit correctly held that it had no jurisdiction over the appeal of the discovery order.

## CONCLUSION

Respondents respectfully submit that there is no merit to the petition for writ of certiorari and it should not be allowed.

Respectfully submitted,

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[1]The cases cited were *National Life Ins. Co. v. Hartford Accident and Indemnity Co.*, 615 F.2d 595 (3d Cir. 1980) (review of nonparty discovery order out of a district court in the Third Circuit, main action pending in the Fifth Circuit); *Republic Gear Co. v. Borg Warner.*, 381 F.2d 551 (2d Cir. 1967) (review of discovery order of district court in the Second Circuit relating to action pending in the Seventh Circuit); *Gladrow v. Weisz*, 354 F. 2d 464 (5th Cir. 1965) (review of discovery order to nonparty in the Fifth Circuit relating to pending action in United States Patent Office); *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421 (1st Cir. 1961) (review of discovery order in the First Circuit relating to main action pending in the District of Columbia).

# RESPONDENTS' APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| HOWELL CORPORTATION and LAKE COAL CO., INC., Plaintiffs | x | |
| v. | x | Civil Action H-87-963 |
| JOHN INNES, Defendant | x | |

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**ORDER**

Pending before this Court is Defendant's Motion to Transfer Civil Action to Eastern District of Kentucky Pursuant to 28 U.S.C. § 1404 (a) (Document #49). Having considered the motion, the memoranda in support and opposition, the argument of counsel, and the applicable law, it is

ORDERED that Defandant's Motion to Transfer Civil Action to Eastern District of Kentucky Pursuant to 28 U.S.C. § 1404 (a) be, and is hereby, GRANTED. It is further

ORDERED that this case be, and is hereby, TRANSFERRED to the Eastern District of Kentucky.

SIGNED at Houston, Texas, on this 29th day of June, 1988.

DAVID HITTNER
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

**CONSOLIDATED CIVIL ACTION**
**Nos. 88-255**
**and**
**87-284**

HOWELL CORPORTATION, ET AL., ..... PLAINTIFFS
COUNTERCLAIM DEFENDANTS

vs. **ORDER**

JOHN J. INNES, ..... DEFENDANT AND
COUNTERCLAIM PLAINTIFF

Motions to impose sanctions under Rule 11, Fed. R. Civ. P., and Rule 26 (g), Fed. R. Civ. P., to quash a deposition subpeona and subpeona *duces tecum,* and for a protective order have been filed by Ronald G. Polly [Polly]. [Record No. 94]. The motions have been fully briefed by the parties and are before the undersigned for consideration. 28 U.S.C. § 636 (b) (1) (A).[1]

Polly, a former attorney for parties Howell Corporation [Howell] and John J. Innes [Innes], is not a party to this action. His name, however, was metioned in the complaint filed by Howell and Lake Coal Corporation [Lake] against Innes. Howell and Lake have long sought to obtain Polly's deposition in this matter and, on June 26, 1989, served a notice of deposition and a subpeona *duces tecum* on the Polly. [Record No. 191]. As a result, Polly claims abuse of discovery under Rule 26 (g) because such a deposition furthers the abuses against him set forth in the complaint.

[1]This action was referred to the undersigned for the disposition of a variety of pending discovery motions and motions for summary judgment. [Record Nos. 185 and 189]. Judge Forester deferred all motions for sanctions pending at the time of referral until the final disposition of the case. Polly's motion was filed subsequent to the referral to the undersigned. Because of the relief sought by the motion, the matter was then referred to the undersigned. [Record No. 196].

Polly maintains that the allegations in the complaint accuse him, without any factual or legal basis, of being a co-conspirator with Innes in a pattern of fraud, kickbacks, bribery, and other criminal activity. He urges the court to find that the complaint was written maliciously and without an adequate pre-filing factual investigation in violation of Rule 11. As a sanction for the alleged Rule 11 violation, and by the motions to quash and motion for protective order, Polly seeks a court order prohibiting the Howell Corporation from taking his deposition.

Howell and Lake, along with parties Vennis Watts, Rudolph Williams, Forrest Cook, and the law firm of Cook, Wright & Taylor, all responded that they believe Polly has critical information regarding the facts at issue in this case. In fact, *two* federal judges have held that Polly must submit to depositions by these parties. *Howell Corp., et al. v. Innes, No. 88-255,* (S.D. Tex. July 1, 1987) [Record No. 34;] *Howell Corp., et al. v. Innes,* No. 87-206, (E.D. Ky. June 23, 1988) [Record Nos. 26 and 27].

As Polly points out, he was not a party to the Texas motion and the ruling did not directly address the arguments raised in these motions. The Texas court motion was made by Innes on the ground that any depositions at that point were premature due to a pending motion to dismiss. The judge denied the motion to dismiss and ordered discovery to proceed.

The June 23, 1988 motion, however, directly addressed the propriety of Polly's deposition. Five days after the Texas court ruling, Polly filed a motion to quash his subpeona and to prohibit the taking of his deposition on the exact grounds raised in the motion now before the court. Judge Reed stayed the taking of Polly's deposition until after certain motions in the case were resolved.[2] The stay was lifted a year later upon reconsideration of the motion at the request of Howell and Lake.

In his June 23, 1988 memorandum opinion, Judge Reed pointed out that the record indicated Polly had acted as counsel for both Howell and Innes and that it was alleged that Howell may have discharged Polly because of conflict of interest. Further, he cited the complaint's charges that Polly acted in concert

[2]At that time, that case was still in the U.S. District Court for the Southern District of Texas.

with Innes in the alleged criminal activity. Judge Reed concluded:

> In light of this background, the court is of the opinion that Mr. Polly 'doth protest too much.' Mr. Polly may very well be completely innocent of all charges lodged against him in the Texas action; however, his involvement or lack thereof in relation to this alleged RICO activity is not the point. The point is that since he has apparently been counsel to both Howell Corporation and John J. Innes, it only stands to reason that he may have information and knowledge relevant to the Texas action. Due to his association with these parties, the court is of the opinion that under FRCivP 26, Howell Corporation is entitled to take discovery from Ronald G. Polly . . . .

*Howell,* No. 87-206, memorandum op. at 5 [Record No. 26].

Polly's appeal of this ruling to the Sixth Circuit was dismissed *sua sponte* at oral argument as having been taken from an interlocutory order. He informs the court that he has filed a petition for writ of certiorari in the United States Supreme Court.

While the prior motions were made solely under Rule 26, this attempt to thwart his deposition travels an indirect route through Rule 11. To escape Judge Reed's analysis, Polly urges that the complaint itself is abusive and improper.

A threshold issue, though not touched upon by the parties, is whether Polly, as a non-party, has standing to move for Rule 11 sanctions. The language of the rule and commentary of the drafters make clear that sanctions may be imposed on any person signing pleadings which are improper under the rule. However, in the opinion of the undersigned, there is no indication that the mere mention of a person's name in a complaint causes that non-party to directly incur expense or that directly results in the expenditure of court resources. *Contra Greenburg v. Sala,* 822 F.2d 882, 885 (9th Cir. 1987).

In *Greenburg,* the movants were named as parties to the complaint at issue, but they were never served and were dismissed. The court cited *Westmoreland v. CBS, Inc.,* 770 F.2d 1168 (D.C. Cir. 1985), as authority for the proposition that non-party witnesses are entitled to seek Rule 11 sanctions. The court in *Westmoreland* had imposed sanctions based on the motion of a non-party witness without discussion of his standing to make

such a motion. Also, the witness in *Westmoreland* moved for sanctions stemming from improper pleadings involving only his deposition, not the complaint as a whole. While, arguably, that type of pleading abuse directly offends the non-party deponent, resulting in expense to the non-party and direct consumption of court resources, it seems a more appropriate remedy for the non-party lies in Rule 26(g) rather than Rule 11.

The undersigned could locate nodefinitive authority on this question as it relates to the situation presented by Polly. Though the resolution of this issue could seriously affect the subject motions, a more certain factor in a Rule 11 analysis forces the undersigned to leave the question of standing for scholarly debate.

Assuming Polly has standing to move for sanctions under Rule 11, "the court must consider whether the party has acted promptly to bring a violation of Rule 11 to the court's attention." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne, and Taylor,* 875 F.2d 1224, 1230 (6th Cir. 1989). The moving party must mitigate any damages by acting promptly and avoiding any unnecessary expenses in responding to papers that violate the rule. *Id.*

The *Jackson* court's discussion of timeliness involved the calculation of attorney's fees awardable as sanctions. However, the goals of Rule 11 mandate that timeliness be considered in the propriety of any sanction under the rule. Those goals are "the deterrence and punishment of offenders and the compensation of their opponents for expenditure of time and resources responding to unreasonable pleadings or motions" *INVST Financial Group v. Chem-Nuclear Systems,* 815 F.2d 391, 404 (6th Cir. 1987).

Here, Polly urges a bar to the taking of his deposition as a deterrent to the allegedly improper conduct of Howell and Lake by their complaint. However, Polly has chosen to drag this matter out for two years and to propageate the expenditure of considerable court time (including that of the United States Supreme Court) before deciding that he would broadside the complaint as a whole. In light of the extent to which he has taken the discovery ruling by Judge Reed, this Rule 11 motion is clearly an afterthought. The extensive delay and alternative proceedings caused by Polly preclude an award of sanctions.

Moreover, the factors cited by Judge Reed in his memoran-

Moreover, the factors cited by Judge Reed in his memorandum opinion make clear that there is a strong likelihood that Polly possesses informaton vital to the parties in this case. As the judge so adeptly stated, Polly "doth protest too much." At this juncture, it is impossible to simply take Polly's word that the charges have no basis in fact.

The deposition Polly wishes to bar is actually an important element toward any determination that sanctions are warranted. The information to be provided, or the lack thereof, will certainly have a bearing on the substance of the allegations stated in the complaint of Howell and Lake. The absence of information contrary to those charges frustrates the conclusion Polly finds so obvious.

Accordingly,

IT IS ORDERED that the motions of Ronald G. Polly to impose sanctions under Rules 11 and 26(g), to quash his deposition subpeona and subpeona *duces tecum,* and for protective order be and same hereby are, DENIED.

This the 10th day of August, 1989.

JOSEPH M. HOOD
United State Magistrate